IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Reply to Brief and Supplemental Memorandum of the Federal Trade Commission in Opposition

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1. On February 16, 1966, the Commission filed a supplemental memorandum solely for the purpose of calling this Court's attention to the recent decision of the Ninth Circuit in *Federal Trade Commission* v. *Jantzen, Inc.,* rendering unenforceable all pre-Finality Act orders of the Commission. Contrary to the contention made by the Commission in its memorandum (p. 2), the *Jantzen* decision has a direct and immediate impact upon this case.

Prior to the filing of its brief in this Court, the Commission defended its denial of the stay sought by United on the ground that Commission orders had been entered against United's two major competitors, and hence that a final order against United would merely place United "more nearly on a par with its major competitors." (R. 140-141) As United pointed out in its petition, however, the issuance of these orders was without practical significance since each of the competitors was continuing to grant essentially the same discounts as before, while the Commission had failed to secure compliance with its orders for over ten years.

In its brief the Commission, now apparently recognizing that the mere existence of unenforced orders against these competitors would not justify its refusal to stay the order against United, argues that these orders were not "dead letters." (Br. in Op., p. 10) Thus, the Commission now seeks, for the first time, to create the impression that the Commission has been and is actively and diligently attempting to secure compliance with its orders against National and Sunshine. It states that National and Sunshine have manifested "their prompt compliance" by filing supplemental reports in response to a compliance directive issued nearly two years ago; that the Commission is "currently considering these reports"; that its task is "complicated by the necessity of analyzing and investigating a very elaborate cost justification"; and that the Commission is "actively considering" the status of these companies' compliance with those orders. (Br. in Op., pp. 10, 12) Surely everything in the public record in this proceeding belies these assertions.

One may wonder what "prompt compliance" and "active" and "current" consideration mean when

cease and desist orders have been outstanding and unenforced for over a decade—in the case of National since 1944 (modified and expanded in 1954), and in the case of Sunshine since 1955.

As for the "very elaborate cost justification" study, no suggestion has hitherto been made in the course of this lengthy litigation of the submission of any cost justification study. So far as United is concerned, it knows of no such study having been submitted. Prior efforts by United to ascertain what compliance reports, if any, had been submitted by National and Sunshine were rebuffed by the Commission on the grounds that the information was "confidential" and "irrelevant." (R. 94-97, 109). After reading the statement in the Commission's Brief in Opposition and determining that it had no record basis, counsel for United inquired of the Commission's staff whether any such cost justification study had been presented and was told that the Commission was not in a position to either affirm or deny the filing of any such cost justification study. Counsel for United then inquired of the author of the Brief in Opposition at the Department of Justice to ascertain the basis for the statement. The latter acknowledged that he had never seen such a study, but stated that he had been told over the telephone by someone at the Commission that such a cost justification study had been submitted about two and one-half years ago.

The Commission presumably offers its representations concerning the submission of compliance reports with "very elaborate cost justification" and their "active consideration" by the Commission as material points for this Court's consideration in the disposition

of this petition. Under the circumstances, however, where United is not in a position to determine the accuracy of these representations, United submits that they should not be taken into consideration by this Court.

Apart from any question as to the past or present efforts of the Commission to secure compliance, the *Jantzen* opinion, as the Commission recognizes in its memorandum, (p. 2), may correctly state the law, and if it does, then the Commission will *not* be in a position to enforce its old orders against United's two major competitors. Thus, the *Jantzen* opinion has reinforced in a dramatic way the inequity that will result to United, for it points up the intolerable competitive position in which United will be placed vis-a-vis its largest competitors, if its order alone becomes immediately effective.

Even assuming that the *Jantzen* decision is subsequently held to be incorrect, the practical and immediate effect of that decision is to frustrate and postpone all attempts by the Commission to enforce the orders against United's two competitors, National and Sunshine. During this interim period, the Commission will not be in a position to press for judicial or even administrative enforcement of those orders. If United's order becomes final and effective, United then will be the only one of these companies subject to an order which may be immediately enforceable in the courts.

Following the decision by the Court of Appeals in this case, but prior to the filing of its petition for certiorari, United on November 26, 1965 filed an application with the Commission asking that the Commission exercise its discretionary authority to stay the effective date of its order until compliance was obtained

against National and Sunshine and to convene an industry conference of the three largest companies with a view to uniform elimination of volume discounts. The Commission responded to this application by the notice of December 21, 1965, which it has attached to its brief. As the notice shows, the Commission did not accept the application or resolve the problem of uniform treatment.

We have attached hereto, as Appendix A, United's application, which details the immediate and irreparable competitive injury that United will suffer if its order becomes final and effective while its major competitors remain free to continue using their volume discount schedules. Everything stated in the application, especially as it relates to the immediate irreparable injury to United, takes on a new urgency in light of the *Jantzen* decision, for that decision has the effect of wiping out the old orders against National and Sunshine and leaving United alone subject to an order requiring the discontinuance of all volume discounts. Such an order, as the application makes clear, would prove disastrous for United.

Thus, since the Court of Appeals passed on the question of the stay, two important changes have taken place. First, the *Jantzen* opinion was handed down, rendering ineffective the outstanding orders against United's two competitors; and second, the Commission, in its letter dated December 21, 1965, denied United's renewed request for a stay, although in its brief in this Court, it now recognizes that competitive hardship should be considered as a ground for postponing the effectiveness of United's order. These new developments in themselves warrant reconsideration by the Court of Appeals of United's request for a stay of its

order, particularly in light of that Court's opinion in *Universal-Rundle.*

Significantly, the Commission does not question the actual conflict in decisions between *Universal-Rundle* and the instant case. It merely seeks to distinguish *Universal-Rundle* by noting that "in the present case cease and desist orders have already been issued against United's principal competitors". (Br. in Op., p. 11) But, as pointed out above, even this distinction is no longer valid in light of the *Jantzen* decision. The *Jantzen* decision, in fact, brings into sharper focus the conflict between *Universal-Rundle* and the instant case.

In view of this conflict in decisions and the general importance of the issue of equitable enforcement of Commission orders, now highlighted in this case by the *Jantzen* decision, we submit that review should be granted. Because of the interrelated character of this issue presented in this case, *Universal-Rundle,* and *Jantzen,* this Court may wish to postpone disposition of this petition until the Government has indicated whether it will seek writs of certiorari in *Universal-Rundle* and *Jantzen.*

2. The Commission's brief ignores the basic issue raised by the first question presented in the petition, namely, that the Court of Appeals did not adopt the test of competitive injury used by the Commission but substituted a new test of its own. The Commission's brief does not even acknowledge, let alone defend, the novel interpretation of *Morton Salt* put forth by the Court of Appeals, but falls back on the automatic inference test used by the Commission. (See Br. in Op., pp. 6-8) Certainly that test as formulated and applied by the Commission cannot be regarded as "the plain

teaching" of *Morton Salt*. As the Commission admits in its brief, there was in *Morton Salt* "an express finding that the amount of discrimination was so great as to affect the purchasers' resale price." (Br. in Op., p. 7) In this case, however, there was no such finding, nor was there any evidence upon which to base any such finding.

For these additional reasons, we submit the petition should be granted.

Respectfully submitted,

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